IN THE

Supreme Court of the United States

October Term, 1967

No. 63

NELSON SIBRON,

Appellant,

against

THE PEOPLE OF THE STATE OF NEW YORK.

APPELLANT'S SUPPLEMENTAL BRIEF

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Pursuant to permission granted at the conclusion of oral argument of the appeal herein, this Supplemental Brief is filed directed to the question of mootness.

Our arguments are the same as those advanced in *Gallmon* v. *New York,* No. 758 Misc. Oct. Term, 1967, now before this Court on petition for writ of certiorari to the New York Court of Appeals.

A. *Jacobs* v. *New York* (388 U. S. 431) and *Tannenbaum* v. *New York* (388 U. S. 439) should be overruled;

B. *Jacobs* and *Tannenbaum* are not applicable;

C. If this case is moot, then the judgment appealed from should be vacated and the complaint dismissed.

A. *Jacobs* and *Tannenbaum* should be overruled.

Last Term this Court summarily dismissed as moot the Jacobs and Tannenbaum appeals upon the determination that the imposition of a suspended sentence insulated the case from review by this Court notwithstanding the fact that New York, as far as its appellate process was concerned, did not consider the cases moot.

Ninety per cent of the business of the criminal courts is conducted in inferior state courts of less than felony jurisdiction. Generally speaking these courts (juvenile courts, misdemeanor courts, etc.) are staffed by judges of lesser experience and competence than the felony courts, and counsel—both for the prosecution and the defense—are also the least experienced and competent. In these courts, courts with almost no public exposure, all of the vagrancy, loitering, disorderly conduct, and other petty offenses are heard; also most of the First Amendment claims are heard in connection with obscenity and free speech-disorderly conduct cases, and most of the Fourth Amendment claims are heard in connection with gambling and minor narcotics cases.

Thus, unless the relatively minor sentences imposed in these cases are held open by bail pending appeal all of

these cases will be insulated from federal review* Indeed in only six out of 327 appeals from the Criminal Court of the City of New York were indigent appellants at liberty on bail pending appeal.

Therefore practically all of these cases where a rough and summary justice is dispensed (see e.g., *Thompson* v. *City of Louisville,* 362 U. S. 199) and where serious constitutional problems most frequently appear will be forever insulated from federal review.

The only alternative to review by this Court, is to open the doors of the district court to immediate intervention on habeas corpus to all state prisoners serving short sentences who seek to raise a federal question which will be mooted by the lengthy procedure of going through the state courts and seeking review here.** This alternative procedure, a source of even greater federal-state friction than direct review by this Court, would open up thousands

* In 1966 the Legal Aid Society, representing 95% of the indigent appellants on convictions arising in New York City, was assigned to represent 327 appellants on appeals from judgments of conviction in the Criminal Court of the City of New York (misdemeanor jurisdiction only) and additionally to approximately 300 appeals from both felony and misdemeanor judgments rendered in proceedings commenced by felony indictment in the Supreme Court divisions located within the City of New York.

In 1964 there were 112,768 convictions and 12,356 acquittals on misdemeanors in the Criminal Court. 1964, *Report of the Criminal Court of the City of New York.* No accurate figure is immediately available for the number of "offenses" (disorderly conduct, prostitution, etc.) or the "Wayward Minor proceedings" held in the Criminal Court of the City of New York.

** We believe that the unavailablity of bail pending appeal is sufficient to sustain immediate habeas corpus jurisdiction under the clause in 28 U.S.C. §2254 which relates to "* * * the existence of such circumstances rendering such [state] process ineffective to protect the rights of the prisoner."

of applications to the district courts without any preliminary screening by the state appellate courts.

Thus while the remoteness in time between conviction and decision by a state's highest appellate court will cause most prospective petitioners to drop out because of lack of endurance, sincerity, or interest, the district courts will be bombarded with writs the day after imposition of a misdemeanor sentence.

B. The *Jacobs* and *Tannenbaum* decisions are inapplicable.

In both *Jacobs* and *Tannenbaum,* under the standard there applied, the case was moot from a federal standpoint upon the imposition of the suspended sentence. In this case a prison sentence was imposed and served. Appellant's case was not federally "moot" from the beginning but if now moot became so because of the New York law which prohibited the Appellant's release upon bail pending appeal. New York Code of Criminal Procedure, §555(2)(c). Thus we are not here dealing with a case that was Jacobs-Tannenbaum moot *ab initio* but we are dealing with a case that the state forced into mootness by its own procedures.*

This distinction was recognized as critical by this Court in *St. Pierre* v. *United States,* 319 U. S. 41 (1943) where the Petitioner had failed to obtain bail from this Court pending the appeal of a federal contempt conviction. In

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* The indigent appellant, unable to raise bail pending appeal, would seem to stand in the same position as the one for whom bail was prohibited by statute.

Appellant could not obtain bail because he was a multiple narcotic offender.

St. Pierre the Petitioner could have taken steps to prevent the expiration of sentence prior to certiorari.

Here the Appellant could not. He had been arrested on March 9, 1965 and remanded in lieu of $1,000 bail. He was convicted on April 23 and was without counsel until May 14, 1965 when leave to appeal as a poor person was granted and appellate counsel assigned. Appellant was discharged upon expiration of sentence (less good time) on July 10, 1965. On June 11, 1965 the transcribed record, ordered by the *forma pauperis* grant of May 14, 1965, was filed and made available to assigned appellate counsel.* Appellant's brief was filed in the Appellate Term on August 26, 1965 for the September Session of that court and the conviction affirmed on October 13. Leave to appeal to the New York Court of Appeals was granted on November 9, 1965 and the case decided by the Court of Appeals on July 10, 1966.

Thus the Appellant was unable to preserve his case from expiration of sentence because,

1. He was not bailable;
2. Even if the Petitioner had been bailable it is incredible to presume that an indigent defendant who could not make the pre-trial bail of $1,000 would be able, after a month in custody, to raise the increased amount which would be fixed after conviction.
3. There was no term of the intermediate appellate court in session while Appellant was in custody and while the record was available.

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* The Appellate Term of the Supreme Court was in recess and heard no arguments on criminal appeals from June 7, 1965 to September 1965.

C. If this case is moot then the judgment appealed from should be vacated and the complaint dismissed.

Unlike *Parker* v. *Ellis*, 362 U. S. 574 (1960), this case comes here as part of the direct appellate process whereby the Appellant seeks vindication of his federal right. If the Appellant is to be precluded from review because of the State's invocation of a mootness doctrine then the Appellant is entitled to the benefit of the procedural protection of that same State's mootness doctrine; particularly so when the State concedes the conviction was wrongful. Under New York law a case which has become moot while in the direct appellate process is to be reversed and the complaint or indictment dismissed. *People* v. *Mintz*, 20 N.Y. 2d 753 (1967).

Conclusion

For the foregoing reasons this case is not moot and this Court has jurisdiction over the appeal; alternatively the judgment should be vacated and the complaint dismissed.

Respectfully submitted,

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